Supreme Court, U.S.
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No. 92-551

In the Supreme Court of the United States

OCTOBER TERM, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 25, 1992
CERTIORARI GRANTED NOVEMBER 16, 1992

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The following opinions and orders have been omitted in printing this joint appendix pursuant to S. Ct. R. 26.1, because they appear on the following pages in the appendix to the petition for a writ of certiorari:

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. 89-CV-1654

JUDGE BARBARA J. ROTHSTEIN

ALPINE RIDGE GROUP, ET AL., PLAINTIFFS

v.

JACK F. KEMP, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

Date	No.	Proceedings
11/9/89	1	COMPLAINT)Summons(es) issued) receipt no. 170198 (bb) [Entry date 11/20/89]
2/1/90	7	AMENDED COMPLAINT FOR DECLARATORY JUDGMENT (jg) [Entry date 2/5/90]
2/15/90	10	ANSWER by defendants (jg)
9/20/90	70	ORDER by Judge Barbara J. Rothstein GRANTING plaintiffs' motion for summary judgment and DENYING defendants' cross-motion for summary judgment. Court finds that Section 801 is unconstitutional in that it violates plaintiffs' due process rights under the Fifth Amendment. cc cnsl. (mb)
9/21/90	71	JUDGMENT: Court finds Section 801 to be unconstitutional in that it violates plaintiffs' due process rights under the Fifth Amendment: plaintiffs' motion for summary judgment GRANTED; defendants' cross motion for summary judgment is DENIED. (cc: all counsel, jgm. book) (mb)

Date	No.	Proceedings
11/16/90	85	NOTICE OF APPEAL by defendants USA and Jack F Kemp from Dist. Court entered 9/20/90 granting pltfs' motion for summary judgment and denying defts cross-motion for summary judgment and from the judgment entered 9/21/90 [71-1] (cc: CCA, BJR, all counsel) (NS) [Entry date 11/19/90]
11/19/90	86	AMENDED NOTICE OF APPEAL [85-1] (NS)
4/16/91	95	ORDER by Judge Barbara J. Rothstein granting pltfs' motion for supplementary relief based upon declaratory judgment in part [90-1] (cc: all counsel) (rs) [Entry date 4/17/91]
4/30/90	96	NOTICE OF APPEAL by defendant USA, defendant Jack F Kemp from Dist. Court decision [95-1] (cc: CCA, BJR, all counsel) (mg) [Entry date 5/1/91]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV-90-0390-MRP

JUDGE MARIANA R. PFAELZER

ACACIA VILLA, ET AL., PLAINTIFFS

v.

JACK KEMP, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

Date	No.	Proceedings
1/25/90	1	Complt. Issd sms.
9/27/90	35	Crt grants ptlf mot for partial s.j. as to counts 1 & 10; Crt to prepare memo of decision or sign ord. M.O. C/r B Zaccaro
10/31/90	40	MEMO OF DECISION ths crt is bound by the 9th Circ constructn of the HAP contracts in Rainier View. HUDs failure to calculate the rent adjustmnts according to the AAAF formula is breach of those contracts. The crt concludes tht 801 is unconstitutional in tht it deprives pltfs of their property right to rent adjustmnts as provided in the HAP contracts w/out due process. etc; Pltf mo for partial s/j on counts I & X are granted. deft mo for s/j is denied. (ENT 10/31/90) mldc py&notic

Date	No.	Proceedings
10/31/90	41	FINAL JDMT&ORD final jdmt forthwith for ptlfs on counts I & X of the 1st A/C declaring tht ptlfs HAP contracts w/US Department of Housing & Urban Development require HUD to determine maximum rents each year by applying the automatic annual adjustmnt factor; & tht HUD's use of comparabilty studies to determine maximum rents for pltfs sectn 8 projects is a breach of HUDs obligation to determine maximum rents each year accoridng to the AAAFs; declar tht sectn 801 of the HUD reform Act of 1989 is null & void because it violates the Constitution of the US as more part discussed in the accompanying memo of decision; declar the frm the dte of ths judmt HUD is obligated to pay to pltfs future rent increases under pltf HAP contract determng by applying the AAAF to the contract rent wch would be in force as of the dte of the jdmt if HUD has applied the AAAF factors in the past w/out comparability studies. (ENT 10/31/90) MD JS-6 mld cpy&notc
11/15/90	42	Notc of mot&Mot deft rl 59(e) mot to amend jdmt; memo of p/a/ decalr of Linda D Cheatman; James J Tasha, &david Shenk. retnbl 1/7/91 10:00 am deft
1/14/91	44	Crt denies mot to amend jdmt; cnsl for pltf to prepare ord. M.O. c/R B Zaccaro
3/7/91	47	Defts fld. NOTC OF APPEAL to 9th CCA frm jdmt ent 10/31/90. Fees waived. Ptys srved: Molly Munger, Lori Martin

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

No. 91-35267

ALPINE RIDGE GROUP, ET AL.

v.

JACK F. KEMP, ET AL.

RELEVANT DOCKET ENTRIES

Date	No.	Proceedings
3/16/91		DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL * * *
2/7/92		FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. J.C. Wallace, author; Proctor R. HUG; Pamela A. RYMER.) FILED AND ENTERED JUDGMENT. [91-25267, 91-35573, 91-55354 * * *
5/29/92		FILED ORDER (J.C. Wallace, Protor R. HUG, Pamel A. RYMER,): denying petition for enbanc rehearing * * *
6/9/92		MANDATE ISSUED * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-55354

ACACIA VILLA, ET AL.

v.

JACK F. KEMP, ET AL.

RELEVANT DOCKET ENTRIES

Date	No.	Proceedings
3/21/91		DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL * * *
4/9/91		Filed Order CONFATT (KWM) these CASES 91-35267 & 91-55354 are consolidated by order[.] * * *
2/7/92		FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. J.C. Wallace, author; Proctor R. HUG; Pamela A. RYMER.) FILED AND ENTERED JUDGMENT. [91-35267, 91-35573, 91-55354 * * *
5/29/92		FILED ORDER (J.C. Wallace, Proctor R. HUG, Pamel A. RYMER,): denying petition for enbanc rehearing * * *
6/9/92		MANDATE ISSUED * * *

[SECURITY AGREEMENT]

This Security Agreement Relating to Section 8 Payments, entered into the 23rd day of August, 1979, by and among Homestead Associates, a Washington Limited Partnership organized and existing under the laws of the State of Washington (the "Mortgagor"), Washington Mortgage Co., Inc. (the "Mortgagee"), Seattle, Washington, the Department of Housing and Urban Development of the United States of America ("HUD"), and the Housing Authority of the County of King, a public body corporate and politic (the "PHA").

WITNESSETH:

WHEREAS, the Mortgagor is the owner of certain real property upon which there is to be erected a housing development designed for occupancy by persons and families of low income consisting of 26 dwelling units on a site located at 108th Avenue S.E. and S.E. 208th in the City of Kent, Washington ("Project"); and

WHEREAS, the Mortgagee is about to make a mortgage loan to the Mortgagor for the development of the Project pursuant to a mortgage note ("Mortgage Note") and a mortgage or deed of trust ("Mortgage") executed as of August 1, 1979, and other related documents executed by the Mortgagor and the Mortgagee (collectively referred to herein as the "Loan Documents"); and

WHEREAS, in order to raise funds to purchase said mortgage loan pursuant to the Mortgage Note and Mortgage and to provide permanent financing for the Project, The Housing Finance Corporation of Washington (the "Corporation") is about to issue its Tax Exempt Note, Series 1979B (Homestead Apartments Project) ("Note") in the principal amount of $722,592 issued pursuant to that certain Agreement for Financing with Tax-Exempt Obligations between the the Mortgagor, the Mortgagee,

the Issuer, Olympic Bank and Unigard Insurance Company, dated August 23, 1979, (the "Agreement"); and

WHEREAS, pursuant to the provisions and requirements of Section 8 of the United States Housing Act of 1937, as amended ("Section 8"), the United States Department of Housing and Urban Development ("HUD") has approved the Mortgagor as the developer of the Project; and

WHEREAS, under Section 8 and the regulations promulgated thereunder the following agreements, among others, have been, or will be, entered into with regard to the Project:

(a) An Annual Contributions Contract (ACC) between HUD and the PHA relating to the Housing Assistance Payments Contract described in subparagraph (c) hereof; and

(b) An Agreement to Enter into Housing Assistance Payments Contract ("Section 8 Agreement") between the PHA and the Mortgagor; and

(c) As provided in the Section 8 Agreement, a Housing Assistance Payments Contract ("Section 8 Contract") between the PHA and the Mortgagor.

WHEREAS, under the Section 8 Contract, the PHA will make housing assistance payments ("Housing Assistance Payments") to the Mortgagor for the benefit of eligible tenants (as defined in the Section 8 Contract) leasing units in the Project; and

WHEREAS, the Section 8 Agreement and the Section 8 Contract are hereinafter collectively referred to as the "Section 8 Contracts";

NOW, THEREFORE, the parties hereto hereby agree as follows:

(1) As security for the performance of all obligations of the Mortgagor under the Loan Documents, and as security for the performance of all of the obligations of the Mortgagor under the Section 8 Contracts, the Mortgagor pledges and assigns to the Mortgagee a security interest ("Security Interest") in all amounts payable under the Section 8 Agreement, the ACC and the Section 8 Contract, respectively, in accordance with their terms.

(2) Unless and until the Mortgagee has given notice to the Mortgagor that either (a) it deems itself insecure, or (b) default has occurred under the Loan Documents, the Mortgagor shall evercise all of its rights under the Section 8 Contracts except Mortgagor will not amend, modify or terminate the Section 8 Contracts.

(3) After giving notice to the Mortgagor that the Mortgagee deems itself insecure or that default has occurred under the Loan Documents, it may, in its sole discretion, exercise any or all of the Mortgagor's rights to payments under the Section 8 Agreement and Section 8 Contract. To further aid the Mortgagee in enforcing its Security Interest hereunder, HUD and the PHA agree that upon receipt of a copy of the notice provided for in this paragraph, all payments which would otherwise be made to the Owner under the Section 8 Contract shall be paid directly to the Issuer. This right of the Issuer shall be in addition to, and not in substitution for, any rights it may have under the Loan Documents and the rights it may have as a secured party under the Washington Uniform Commercial Code.

(4) To aid the Mortgagee in enforcing its Security Interest hereunder, the Mortgagor agrees that:

(a) The Mortgagee and its agents or employees are hereby empowered as Mortgagor's attorneys-in-fact, irrevocably while the Mortgage Note is unpaid, and with power of substitution, to do all acts and things which the Issuer may deem necessary or expedient to perfect, protect and enforce the Issuer's Security Interest, including, but not limited to:

(1) Signing Mortgagor's name on and filing financing statements and other notices under law; and

(2) Subject to the approval of HUD, executing any assignments or other instruments or transfer respecting the Section 8 Contracts after any default under the Loan Documents; and

(3) Performing any obligation of the Mortgagor under the Section 8 Contracts; and

(b) The Mortgagor will execute financing statements whenever requested to do so by the Issuer.

(5) The Mortgagee shall have the right to enforce this Agreement and the rights of the Mortgagor assigned to the Mortgagee as secured party, notwithstanding any default or failure of performance by HUD under the Section 8 Contracts.

(6) To the extent consistent with Section 8 and the regulations promulgated thereunder, this Agreement shall be governed by, and construed in accordance with, the laws of the State of Washington.

(7) The Mortgagee may assign its rights hereunder to the Corporation and the Corporation may pledge all rights under such assignment as additional security for its Tax Exempt Note.

HOMESTEAD APARTMENTS, a limited partnership
By: Delta One Limited, a Washintgon
Corporation As its: General Partner

Dated 8/21/79 By /s/ [Illegible]
Duly Authorized Agent
DONNA D. DIXON, President

WASHINGTON MORTGAGE CO., INC.

Dated 8/21/79 By /s/ Carol P. Hanson
Vice Pres.

SECRETARY OF HOUSING AND URBAN DEVELOPMENT, acting by and through the Federal Housing Commissioner

Dated Aug. 23, 1979 By /s/ [Illegible]
As its Authorized Agent

HOUSING AUTHORITY OF THE COUNTY OF KING

Dated 8/21/79 By /s/ Jim Wiley
Executive Director

[LETTER FROM E.J. MOGER TO DAVID L. BELLER]

August 23, 1979

In Reply Refer To: 10.3G

Mr. David L. Beller
Preston, Thorgrimson,
Ellis, Holman & Fletcher
2000 IBM Building
Seattle, Washington 98101

Dear Mr. Beller:

Subject: Homestead Apartments Project
The Housing Finance Corporation of
Washington
HUD Project No. WA19-0048-001

We have reviewed copies of the documents identified in Exhibit A, attached hereto, in connection with the proposed issuance and sale by The Housing Finance Corporation of Washington (the "Issuer") of its $716,800 principal amount of Tax Exempt Note (Homestead Apartments Project) to provide interim and permanent financing for the Project. I hereby make the following determinations pursuant to the provisions and requirements of 24 CFR Part 811, Subpart A, published in the Federal Register on August 3, 1977:

(1) The Housing Authority of the County of King (the "Authority") is hereby found and determined to constitute and is approved as a "public housing agency" within the meaning of Section 3(6) of the United States Housing Act of 1937, as amended (the "Act"), pursuant to 24
(2) The Issuer is hereby found and determined

(2) The Issuer is hereby found and determined to constitute and is approved as an "agency or instrumentality" for purposes of 24 CFR Part 811, Subpart A, pursuant to 24 CFR Section 811.105;

(3) The Authority and the Owner have executed an Agreement to Enter into a Housing Assistance Payments Contract in connection with the Project;

(4) The Note, when and if issued in acoerdance with the documents identified in Exhibit A, will be issued in connection with a low-income housing project approved by HUD and in compliance with the Act and applicable regulations;

(5) The Note in the amount of $716,800 does not exceed the maximum amount of permanent obligations eligible for tax exemption in connection with the Project, as required by 24 CFR Section 811.106;

(6) The Note in the amount of $716,800 does not exceed the maximum amount of interim obligations eligible for tax exemption in connection with the Project, as required by 24 CFR Section 811.108;

(7) The term of the Note is acceptable to HUD and is found to be in accord with 24 CFR Section 811.108;

(8) The term of the Housing Assistance Payments Contract for this project will not exceed the maximum allowable under 24 CFR Section 811.106(b);

(9) The interest rate of 7.25% per annum on the Note during the interim period and of 7.35% per annum for the permanent loan are hereby approved as reasonable and found to satisfy

24 CFR Sections 811.108 and 811.106, respectively;

(10) The use of proceeds of the obligation is consistent with the uses permitted by 24 CFR Sections 811.107 and 811.108; and

(11) All of the provisions in the documents identified in Exhibit A are satisfactory and acceptable to HUD in compliance with approved HUD regulations.

Based on the above determinations and the approval of the final approval for this Project, the terms and conditions of the financing are approved.

Based on these determinations, we have concluded that the Issuer's Note identified above when issued in accordance with the above-described documents, shall constitute an obligation in accordance with Section 11(b) of the United States Housing Act of 1937, which provides that: (1) "obligations, including interest thereon, issued by public housing agencies in connection with low-income housing projects shall be exempt from all taxation now or hereafter imposed by the United States whether paid by such agencies or by the Secretary." (2) "The income derived by such agencies from such projects shall be exempt from all taxation now or hereafter imposed by the United States."

Pursuant to Section 811.110, this notification of approval of tax exemption shall not be subject to revocation by HUD.

Sincerely,

/s/ E. B. Moger
E. B. MOGER
Area Manager

Attachment

Exhibit A

1. Agreement between Housing Authority of County of King, (Authority), and Housing Finance Corporation of Washington, (HFC) dated March 20, 1979.
2. Authority Resolution No. 1356, dated April 18, 1978, authorizing Agreement with HFC.
3. Articles of Incorporation of HFC filed April 24, 1978, and Amended Articles of HFC filed April 20, 1979.
4. By-Laws of HFC.
5. Agreement for Financing with Tax-Exempt obligations dated August 23, 1979, not-fully-executed copy received August 21, 1979.
6. HFC Resolution No. 9, dated June 21, 1979, authorizing issuance of note.
7. Authority Resolution No. 1435, dated June 19, 1979, and Authority Resolution No. 1451, dated August 21, 1979, approving financing plan.
8. Pledge Agreement between HFC and Washington Mortgage Co., Inc.
9. Building Loan Agreement dated August 1, 1979.
10. Mortgage Note dated August 1, 1979.
11. Mortgage dated August 1, 1979.
12. Security Agreement Relating to Section 8 Payments, executed by HUD on August 23, 1979.
13. HFC Certification as to Projected and Actual Financing Terms, dated August 21, 1979.
14. Opinion of Preston, Thorgrimson, Ellis, Holman and Fletcher that HFC satisfies requirements of 24 CFR 811.105(a), dated August 21, 1979.
15. Draft of Assignment and Declaration by Washington Mortgage Co., Inc., received August 21, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-16542

ALPINE RIDGE GROUP, *et al.*

v.

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Housing and Urban Development; and the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs allege as follows:

JURISDICTION AND VENUE

1. *Declaratory Judgment.* This is an action for a declaratory judgment under 28 U.S.C. § 2201 to determine the legal rights of the parties in the actual controversy described below.

2. *Speedy Hearing.* Plaintiffs request a speedy hearing pursuant Fed. R. Civ. P. 57.

3. *Jurisdiction.* This is a civil action arising under the Constitution and laws of the United States. Jurisdiction is vested in this Court under 28 U.S.C. § 1331.

4. *Venue.* Venue is proper in this district under 28 U.S.C. § 1319(e) because certain of the named plaintiffs reside in this district, their contracts were entered into and are administered in this district by the Department

of Housing and Urban Development ("HUD"), the real estate affected by those contracts is located in this district, and their causes of action arose in this district.

CLAIM FOR RELIEF

5. *Section 8 Statute.* Under Section 8 of the National Housing Act, 42 U.S.C. § 1437(f) ('Section 8 Statute"), Congress established a program to provide subsidized housing for the elderly, handicapped, and poor.

6. *HAP Contract.* Each of the plaintiffs entered into a Housing Assistance Payment contract ("HAP Contract") with HUD or its agent under which plaintiffs constructed or substantially rehabilitated housing units and rented them to the elderly, handicapped, and poor. The HAP Contract specified the initial rents and provided for an automatic annual adjustment of the allowable rents based on factors to be determined and published by HUD ("Factor Rent Adjustments"). The tenant paid a portion of the rent based on the tenant's income, and the balance of the rent was paid by HUD directly to the owner. All of the contracts and projects involved in this action are described in Exhibit "A" attached hereto.

7. *Denial of Factor Rent Adjustments.* HUD has refused to grant Factor Rent Adjustments to plaintiffs, claiming that the Section 8 Statute and HAP Contract permit HUD to use individual rent comparability studies as an independent method of determining rent adjustments.

8. *Ninth Circuit Decision in Rainier View.* In *Rainier View Associates v. United States of America*, 848 F.2d 988 (9th Cir. 1988), *cert. denied* 109 U.S. 2065 (1989), the Ninth Circuit ruled that the Section 8 Statute and HAP Contract unambiguously provide that the Factor Rent Adjustment method is the exclusive method of adjusting rents, and that rent comparability studies can only be used by HUD in determining the applicable factors.

9. *HUD Represented That It Would Comply.* HUD represented to the Ninth Circuit that it would acquiesce in the *Rainier View* case in the Ninth Circuit when and if certiorari was denied. As part of its representation, HUD requested the Ninth Circuit to vacate an injunction in *Rainier View* granting relief to nonparties, on the grounds that such relief was unnecessary. See page 3 of HUD's Petition For Limited Rehearing in the *Rainier View* case:

> "The beneficiaries of these orders (certain nonparties) now have no need for the procedural rulings which would be vacated because they have the benefit of the precedential affect of a *substantive* ruling by this court in another appeal in this same case. Indeed, this was the very reason this court held the instant appeal moot."

By letter dated May 15, 1989, a copy of which is attached as Exhibit "B," HUD again requested that the injunction granting relief to nonparties be vacated on the grounds stated in HUD's original Petition For Limited Rehearing (i.e., that nonparties would be granted relief without the necessity of further legal action). Based on those representations, the Ninth Circuit vacated the lower court's injunction (see Order attached as Exhibit "C").

The Supreme Court denied HUD's petition for certiorari in the *Rainier View* case on May 15, 1989. On May 19, 1989, HUD issued a memorandum directing its field offices in the Ninth Circuit to comply with the *Rainier View* decision. A copy of HUD's memorandum is attached to this complaint as Exhibit "D".

10. *Plaintiffs Relied On HUD's Representation.* Relying on HUD's representations, which had been communicated to plaintiffs, plaintiffs did not take further legal action to assure compliance by HUD with the *Rainier View* decision.

11. *HUD Reneges On Its Representations.* Contrary to its representations to the Ninth Circuit and to the plaintiffs, HUD has failed to apply the *Rainier View* de-

cision to other projects in the Ninth Circuit. Instead, HUD secretly drafted and lobbied for, and Congress has enacted, legislation attempting to retroactively and prospectively repudiate HUD's obligation to make full rent adjustments on the basis set forth in the *Rainier View* case. The legislation referred to is Section 801 of HR1, signed by the President on December 15, 1989. The legislation:

> (a) Constitutes a taking without just compensation, in violation of the Fifth Amendment to the United States Constitution;
>
> (b) Constitutes a deprivation of property without due process of law, in violation of the Fifth Amendment;
>
> (c) Constitutes a questioning of the public debt in violation of Section 4 of the Fourteenth Amendment.

JUDGMENT SOUGHT

Plaintiffs pray for judgment as follows:

1. *Declaratory Judgment.* A declaration: (a) that the Section 8 Statute and HAP Contract require HUD to grant Factor Rent Adjustments to plaintiffs; (b) that Section 801 of HR.1, PL.101-235, is unconstitutional; and (c) HUD is estopped by its conduct from asserting Section 801 of HR1 as a defense to this action.

2. *Attorneys' Fees.* An award of plaintiffs' attorneys' fees and costs in this action.

3. *Other Relief.* Such other relief as the Court may deem proper.

DATED this 31st day of January, 1990.

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM
WARREN J. DAHEIM
WSBA No. 03992
JOHN C. GUADNOLA
WSBA No. 15198
DONALD W. HANFORD
WSBA No. 05948

By: _____
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALPINE RIDGE GROUP, *et al.*

v.

JACK F. KEMP, *et al.*

DEFENDANTS' ANSWER TO PLAINTIFFS' AMENDED COMPLAINT

[Filed Feb. 15, 1990]

Defendants, the United States Department of Housing and Urban Development ("HUD") and Jack F. Kemp, Secretary of HUD, answer plaintiffs' Amended Complaint filed in the above-captioned case as follows:

FIRST DEFENSE

The Court lacks subject matter jurisdiction over the claims brought in this action.

SECOND DEFENSE

Plaintiffs fail to state a claim upon which relief can be granted.

THIRD DEFENSE

In response to the numbered paragraphs of the Amended Complaint, defendants answer as follows:

JURISDICTION AND VENUE

1. This paragraph contains plaintiffs' characterization of this suit to which no answer is required, but if an answer is required, it is denied.

2. This paragraph contains a request to the Court to which no answer is required.

3-4. The allegations in these paragraphs constitute conclusions of law to which no answer is required, but insofar as an answer may be deemed required, they are denied.

CLAIM FOR RELIEF

5. This paragraph contains a characterization of 42 U.S.C. § 1437(f), to which this Court is respectfully referred for a full and accurate statement of its contents.

6. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of this paragraph, except to admit that each of the plaintiffs entered into a Housing Assistance Payments ("HAP") contract with HUD or a Public Housing Agency, and except to the use of the term "sought" by plaintiffs, which constitutes a conclusion of law to which no answer is required, but insofar as an answer may be deemed required, it is denied. Defendants deny the second sentence of this paragraph. Defendant's admit the third sentence of this paragraph. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in the fourth sentence, except to admit that a document described as Exhibit "A" is attached to the complaint filed in this matter.

7. Denied.

8. The first sentence of this paragraph contains plaintiff's characterization of a Ninth Circuit Decision, to which this court is respectfully referred for a full and accurate statement of its contents. *Rainier View Associates v. United States of America*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 2065 (1989).

9. The first and second sentence of this paragraph contain a characterization of HUD's Petition For Limited Rehearing in *Rainier View Associates* to which this court is respectfully referred for a full and accurate statement of its contents. The third sentence of this paragraph contains an excerpt from HUD's Petition For Limited Rehearing, to which this court is respectfully referred for a full and accurate statement of its contents.

The fourth sentence of this paragraph contains plaintiffs' characterization of a letter dated May 15, 1989, and attached to the Amended Complaint as Exhibit "B", to which this court is respectfully referred for a full and accurate statement of its contents. The fifth sentence of this paragraph contains a characterization of a Ninth Circuit Order attached to the Amended Complaint as Exhibit "C", to which this court is respectfully referred for a full and accurate statement of its contents.

Defendants admit the sixth sentence of this paragraph. The seventh sentence of this paragraph contains plaintiff's characterization of a HUD memorandum dated May 19, 1989, to which this court is respectfully referred for a full and accurate statement of its contents. Defendants admit that a copy of a HUD memorandum dated May 19, 1989, is attached as Exhibit "D."

10. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

11. Defendants deny the first sentence of this paragraph, and further aver that Title VIII of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987 (Dec. 15, 1989) governs HUD's authority to extend the *Rainier View* decision to non-parties. Defendant's deny the second sentence of this paragraph, except to admit that Congress enacted Title VIII of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987 (Dec. 15, 1989), to which this Court is respectfully referred for a full and complete statement of its contents. Defendants deny the third sentence of this paragraph, except to admit that the President signed the Act, which contains section 801, on December 15, 1989. The fourth sentence of this paragraph

constitutes conclusions of law to which no answer is required, but insofar as an answer may be deemed required, they are denied.

JUDGMENT SOUGHT

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Title Omitted in Printing]

AFFIDAVIT OF DEAN CHAUSSEE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF WASHINGTON)
) ss.
COUNTY OF KINGS)

Dean Chaussee, being first duly sworn, on oath, deposes and says:

This affidavit is submitted in support of plaintiff's Motion for Summary Judgment.

1. I have been in the business of developing and building apartments and homes for more than 25 years. I am a registered Apartment Manager, a designation given by the National Association of Home Builders. I am also a Director of the National Association of Home Builders and of the National Leased Housing Association.

2. I developed, financed, and built some 12 projects in the 1970's under the Section 8 Program, all in response to HUD's Notification of Funding Availability and all financed without using FHA insured loans. I am fully familiar with the Section 8 Program having been one of the original participants involved in Section 8 Projects over the past 15 years.

3. Section 8 was adopted August 22, 1974, as part of the Housing and Community Development Act of 1974. "Section 8" refers to the fact that, in the 1974 Act, a new Section 8 was incorporated into the United States Housing Act of 1937. It created a new form of public housing, owned and operated by private developers. A

better understanding of Section 8 can be had by a short explanation of two earlier programs. Those two earlier programs are Section 23 and Section 236 of the Housing Act.

4. Section 23 was a 1965 Public Housing Program under which units were rented by public housing authorities from private owners and sublet to qualified tenants. In 1974, HUD amended Section 23 Regulations to provide that the owner would lease his units directly to qualified tenants. The Public Housing Authority would subsidize the rents by directing assistance payments to the owner. Under the revised program, the owner was to take the risk of occupancy (instead of the government) and was to manage the units. New construction regulations provide for long term contracts between owners and housing authorities, with automatic annual adjustments and rents on the basis of the Bureau of Labor Statistics Index of rents for those localities for which the Bureau of Labor Statistics published rents. Regulations were drafted by a task force headed by Joseph Burstein, Chief Counsel of the Assisted Housing Section. There was some feeling that the regulations went beyond the statutory authority of the 1965 Act. For that reason, HUD proposed a new revised Section 23, following the outline of the revised regulations. A new act was enacted as Section 8. The old Section 23 was left in place for existing projects in the pipeline and covered the contingency that Section 8 might prove unworkable. The formula approach used in the revised Section 23 program was the predecessor of the formula approached ultimately used in Section 8.

5. Section 236 was enacted in 1968. It was designed to provide new or rehabilitated rental and cooperative housing for lower income families. The program combined federal mortgage insurance with subsidized interest payments to mortgagees (lenders) in order to reduce the mortgagor's (owners) monthly mortgage payment. The interest payment subsidy lowers the effective interest rate of the mortgage to one percent. The benefits of

the reduced interest payments were to be realized by the tenants of the project in the form of lower rents.

As originally enacted, the Section 236 Program was meant to stimulate housing production by making private industry the primary vehicle for providing shelter for low and moderate income families. Under Section 236, rents were adjusted by HUD under a project-by-project expense analysis which attempted to give increases for costs plus a limit of six percent return to the owner. The delays in the rent adjustment process, and the fact that interest subsidies were never increased, resulted in vacancies and cuts in services to tenants. Ultimately, many Section 236 projects defaulted when income provided insufficient funds to pay operating costs. Section 236 was suspended during the 1973 subsidized housing moratorium and has never been revised as an active production program. In 1974 HUD formed a special task force to deal with defaults under Section 236 projects and make appropriate recommendations to Congress.

6. In 1974, the federal government's housing programs for the poor were in chaos. High-rise public housing had turned into crime infested ghettos. As costs increased, the government simply had to pay the cost or be faced with bankruptcy of public housing agencies or the prospect of having to take over the administration of local programs and projects. Section 236 projects were likewise a disaster. Section 8 was passed in response to the failings of these programs.

7. It is clear that neither Congress nor HUD wanted a project-by-project rent adjustment process similar to 236 when it enacted the Section 8 Program. That has been admitted by the highest officials in HUD. See, for example, the deposition of James Tahash, head of the Program Planning Division in the HUD Office of Multi-Family Housing Management. Mr. Tahash's deposition was taken by the plaintiff in the Rainier View case on February 23, 1984, in Washington, D.C. Mr. Tahash clearly stated that Congress did not intend the program

to be in any way similar to Section 236. At page 67 to 68 of his depositions, questions and answers went as follows:

"Q. Because if you did a project-by-project analysis cost then you would be right back in the 236 program.

A. Yes, sir.

Q. And it's pretty clear Congress did not intend this program to process rent adjustments the way they were doing then under Section 236.

A. Or under the FHA rent formula. The 236 is the FHA rent formula.

Q. Right, and the rent formula is a project-by-project analysis.

A. Yes, sir.

Q. And once again, I'm pretty clear Congress didn't want you to follow the rent formula.

A. Yes, sir.

Q. Do you know why that was? . . .

A. I believe that number one, the Department did not want to do it because of the fact that they did not want to go into it. When we proposed the regulations, they were trying to make this a market, conventional market program, partially assisted. They did not want it to be insured, and they did not want the staff intensive work required in the insured programs. They wanted this program to be a less staff intensive program.

And therefore, what they wanted to do is set it up in such a way so that the rents could be adjusted using a rent formula, but that they did not want to get into a staff intensiveness by doing a project-by-project rent determination."

On Page 25 of Tahash's deposition:

A. "It may be an unfortunate selection of words, but the object was not to say it was profitable to the

owers, but rather that they do not have to hire HUD to process rents, as we do under rent process, and make it clear under the Regs, that they did not have a process of rents as we did for rent prgorams; that their rents will be adjusted for the annualization.

Q. You were trying to make it simple?

A. Yes, and it may have been an unfortunate choice of words."

8. The Section 8 Program was simple. All the failings of public housing (operated by the public sector) and the Section 236 Program (operated by the private sector, but with no inflation edge) were to be avoided. Under Section 8, HUD aggressively solicited private developers to submit proposals to design, construct, and operate specialized housing for targeted social groups at locations picked by HUD. If a developer's proposal was selected, HUD and the developer entered into a Housing Assistance Payment (HAP) Contract. Under the HAP Contract, rents were agreed upon in an amount high enough to induce the developer/owner to participate in the program. The developer/owner was to collect a portion of the rent (originally 25% but later increased to 30% of the tenant's income) directly from the tenant, while the remainder was to be paid to the owner by HUD either directly or through a local public housing agency as a contract administrator.

9. In early March of 1975, I attended an in depth briefing of the Section 8 program at the National Association of Home Builders (NAHB) headquarters in Washington D.C. This briefing was jointly sponsored by NAHB and HUD. Larry Simons, then FHA Commissioner and Deputy HUD Secretary for Housing, presented the view from HUD. He presented the Section 8 Program as a program completely devoid of the problems of the failed Section 236 Program in that HUD would have the private sector develop, own, manage and conventionally finance projects with HUD supplying tenant subsidy by way of a

project contract. The key factor to be considered according to Simons, was that HUD would not interfere with the project income but would make automatic annual adjustments to the rental rate. The automatic adjustment would be based on published factors for selected geographic areas. The program, as presented by Simons and in the published material, was of interest to many developers/builders who could visualize a method of accomplishing two goals in a given project: house low income tenants in scattered projects without typical HUD interference, and, since the program was profit motivated, to potentially make a businesslike profit while providing this necessary housing.

10. The key to understanding the Section 8 Program is the fact that its purpose was not to build marketing housing. The market had not produced, and was not going to produce, the type of housing at the locations that HUD wanted. For example, over seventy percent of the Section 8 housing eventually built was designed for the low income elderly. It mirrored market rate retirement housing in design, services (except for meal service), and tenant population. It differed in being located in rural areas (which could not support market rate retirement housing) or on prime downtown building sites. It also differed in that rents charged in Section 8 elderly projects were almost uniformly lower than rents charged in structurally comparable market retirement housing.

A comparison of Section 8 elderly and market rate retirement housing is as follows:

Zoning: Developers of Section 8 housing invariably faced bitter zoning battles, not encountered by market rate retirement housing.

Location: The geographic areas designated by HUD for Section 8 elderly projects generally fell into two categories: An area or locale where no prudent, private developer would develop housing due to local income levels, or an expensive downtown site on prime commercial

property. By comparison, market rate housing for the elderly could be located wherever the owner chooses, which in most cases would not be in rural areas or an expensive downtown location.

Design: Section 8 elderly housing, like market rate retirement housing, is designed to meet the needs of a highly targeted tenant group. Some of the design features include lobbies and wide interior corridors, managerial spaces, elevators, wheelchair accessibility, fire rating and alarm systems, emergency call systems, security systems, dining and multi-purpose areas, and other specialized elderly safety features.

Building Costs: Davis-Bacon wage requirements and HUD red tape increased section building costs substantially.

Tenant-Population: The tenant population of Section 8 elderly housing must be 62 years of age or older, handicapped, or disabled. Like market rate retirement housing, the average age of tenants in Section 8 elderly projects is 80 years. In addition to the special problems posed by the elderly, Section 8 projects must also house the handicap and the disabled regardless of age. The disabled category includes those who are mentally impaired, those with drug and alcohol problems, and those with AIDS. The tenant population creates huge management problems which are expensive to solve. HUD grants no extra compensation for solving those problems.

Management: Government regulations, red tape, and paper work add substantially to the cost of managing a Section 8 project. Over the years the paper work has continued to increase as HUD requires more and more reports.

Financing: Conventional financing for Section 8 new construction projects was extremely difficult to obtain. Most lenders were leery of any government program on the theory that the government could not be trusted. When conventional financing was slow to develop, HUD

promoted what was called Section 11(b) financing. Section 11(b) financing was a program to grant tax exemption to the income on bonds or notes issued by a public housing agency in connection with development of Section 8 projects. The HAP contract was the security for the bonds. HUD bond experts again put on seminars trying to induce the lending community to finance projects that the goverment itself refused to finance.

To induce the private developers to build and the lenders to finance Section 8 housing, Congress authorized HUD to make annual inflation rent adjustments. This was to be done by either an annual market survey, or by a formula. To further induce the private sector to use Section 8, and to avoid costly and complicated procedures, HUD elected a formula inflation adjustment consisting of automatic adjustment factors. To further induce private developers like myself to invest in Section 8 housing, HUD inserted typical bond language into the Section 8 Contracts and I relied on that language which states as follows:

> 1.6 *Government Assurances to Owner.* The execution of this agreement by the government signifies that the faith of the United States is solemnly pledged to the payment of housing assistance payments pursuant to the contract and that funds have been obligated by the government for such agreements.

HUD's attempts to "sell" the Section 8 new construction program to developers and lenders went to extreme lengths. HUD put on a number of seminars, many of which I attended. Local HUD officials contacted developers to ask if they would be interested in developing under the program. Repeated assurances were given that this program would be unlike other previous government programs that had been over regulated.

11. The initial rents agreed to between HUD and the developer/owners were not market rents. Initial rents

were simply the rents HUD felt it had to pay developers to induce them into the program. In the Rainier View case, the deposition was taken of Ray Bradley, Seattle HUD Director Development, who dealt with all of the owners in the area on new construction projects under Section 8 from the Seattle Office. (Page 26 of deposition:)

> "Q. The original rents that were sent they were in most cases above market, were they not?
>
> A. Yes, they were."

At p. 29:

> "Q. Your office had certain production goals, is that correct?
>
> A. That is correct.
>
> Q. Basically to meet those goals you had to interpret the object and purpose of the program, is that correct?
>
> A. That is correct.
>
> Q. In so doing the rent reasonableness test became a means of justifying the rents necessary to make these projects feasible.
>
> a. Basically, yes."

Likewise, the deposition was taken in the Rainierview case of Lynn Stowell, HUD Director, Housing, at page 36:

> "Q. The original contract rents were not market rents, I take it, but something in excess of market?
>
> A. Yes.

Likewise, Mr. James Tahash from Washington D.C. testified under deposition in the Ranier View case that the original rents were basically negotiated rents (see page 54 of his deposition):

> "Q. The annual rent is negotiated rent in new construction, is it not?
>
> A. We both will agree that that is not necessarily the comparable rent for that area."

12. To induce the private sector to build Section 8 projects, HUD elected to use automatic annual rent

adjustments. Commencing in 1976, HUD published annual adjustment factors in the federal register. Those factors were used for two purposes. They were used to arrive at new fair market rents for existing housing. Second, they were used to make adjustments under new construction contracts. The factors were based on the CPI for the previous twelve months for rents and utilities in the various SMAs and districts. For each SMA and census region, a single factor was developed for adjusting contract rents, excluding utilities. A matrix of 105 separate factors reflecting differences for various rent ranges and bedroom sizes was developed for adjusting the rents on units including utilities.

Until 1981, with possibly a few minor exceptions, the factors were applied automatically to the entire contract rent on the contract date. At the time of each adjustment the owner and HUD would enter into an addendum setting forth the new contract rent.

The decision to use the CPI was made by the policy division of HUD. At the time it was adopted, HUD felt that there was no other reliable index which could be used. To date, the CPI is an accurate measure of market rate increases in the various areas.

In 1982, HUD published factors based on a combination of the CPI and the annual housing survey. The selection was made by the economic division of HUD.

Prior to 1981, with the possibility of a few exceptions, HUD field offices throughout the United States uniformly granted annual rent adjustment for Section 8 new construction projects using the rent process described at 24 CFR Part 888, subpart B in effect at that time.

Since 1981, some HUD field offices have conducted project-by-project comparability surveys on individual Section 8 projects within their jurisdiction. A survey performed by the Office of Inspector General of HUD during the period July 10, 1981, to September 20, 1982, covering Regions I, IV, V, and VIII disclose that in seven of the

eight field offices where comparability studies were performed, two different methods were used.

The September, 1983 telephonic survey of all 54 field offices of HUD which are responsible for administering the Section 8 program for Section 8 projects within their jurisdiction, summarizes which of the field offices were then conducting some type of comparability reviews. There is no assurance that further investigation would not reveal more variances than are indicated in the survey.

The survey identifies at least two different processes for conducting comparability surveys, although there may be more. There is no assurance that these processes are uniformly followed for all Section 8 new construction projects in any one field office.

13. In summary, Section 8 was designed as a program for the private sector to take over the government's responsibility to house the homeless. The attraction to the program was that not only would developers be performing a valuable social service, but they had a chance to make profits if they watched their costs. I along with other developers have performed our part of our contracts and HUD has consistently attempted to back out of its obligations under the contract.

DATED this 3rd day of April, 1990.

/s/ Dean Chaussee
DEAN CHAUSSEE

DECLARATION OF JONA GOLDRICH

I, JONA GOLDRICH, declare as follows:

1. I, Jona Goldrich, am a general, and in some instances, also a limited partner, of each of the 59 of the plaintiff partnerships. Except as otherwise noted, the facts set forth in this affidavit are known personally by me. I am authorized to submit this affidavit on behalf of each of the plaintiff partnerships.

2. Each of the plaintiffs is a California general or limited partnership.

3. In the early 1970s, I and various partners in the plaintiff partnerships participated in HUD's Section 221 (d) (3) and Section 236 low-income housing programs, which preceded the Section 8 program. Indeed, I participated as a partner in at least 50 such projects. Although the low interest mortgages for Section 221 (d) (3) and Section 236 projects remained constant, the annual operating costs of the projects escalated dramatically and for a variety of reasons, including the complicated and time-consuming procedure HUD utilized in reviewing developers' requests for rent increases, as well as the fact that HUD's procedures ultimately resulted in the utilization of outdated cost data, the Section 221 (d) (3) and Section 236 projects did not yield developers a fair annual rate of return. Because of our negative experiences with the delays and extraordinary administrative inconveniences associated with case-by-case adjustments, we participated in the Section 8 program only because the Section 8 HAP contracts, unlike the Section 221 (d) (3) and Section 236 program contracts, provided for rent adjustments to be computed at least annually according to an equitable, timely and simplified formula to be published in the *Federal Register*. We also agreed to participate in the Section 8 program because the Section 8 HAP contracts and the Section 8 enabling regulations, unlike the Section 221 (d) (3) and Section 236 programs,

did not purport to limit artificially the developer's return on equity. Thus, when we entered into the Section 8 program, my partners and I believed that we would realize a fair rate of return and that HUD would use streamlined procedures for adjusting rents annually through automatic annual adjustments, rather than the case-by-case method.

4. Each of the plaintiffs has entered into a Housing Assistance Payment ("HAP") contract with the United States Department of Housing and Urban Development ("HUD") for the provision of rental housing to low-income families or low-income senior citizens. Attached as Exhibit 1 is a list identifying each of the plaintiffs, and, for each such plaintiff, the location of the project, the HAP contract number by HUD monthly debt service on the project, and the amount owed.

5. Each of the plaintiffs executed with HUD one of several different HAP form contracts. Attached as Exhibits 2-A, 2-B and 2-C are true and authentic copies of three variations of the HAP contracts. The form of contract that each plaintiff executed with HUD is identified in Exhibit 1.

6. Pursuant to the terms of the HAP agreements, each of the plaintiffs construed a new apartment complex to provide rental housing for low-income senior citizens. Pursuant to the terms of the HAP agreements, each of the plaintiffs presently provides rental housing for low-income families or low-income senior citizens.

7. Each of the HAP contracts and the Agreements to Enter into HAP contracts ("AHAPs") that plaintiffs executed with HUD contains a rent adjustment provision that expressly requires HUD to compute annual rent adjustments according to the formula published in the *Federal Register*, commonly known as the Automatic Annual Adjustment Factors ("AAAF").

8. Each of the HAP contracts described in paragraph e contains a rent adjustment provision. The relevant rent adjustment provision in 39 of plaintiffs' HAP con-

tracts, each of which is identified as contract form 1 or 2 in Exhibit 1, states:

> *Automatic Annual Adjustments.*
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register . . .
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

9. In the remaining 20 HAP contracts, each of which is identified as contract form 3 in Exhibit 1, the relevant rent adjustment provision states:

> Upon request from the Owner to the [Contract Administrator], Contract Rents will be adjusted on the anniversary date of the Contract in accordance with 24 CFR 888 and this Contract. See, however, paragraph (d).

10. Each of plaintiffs' HAP contracts, including the 20 HAP contracts identified in paragraph 9, was executed by a plaintiff and HUD pursuant to an AHAP. An AHAP is the agreement between the owner and the contract administrator which provides that, upon satisfactory completion of the project in accordance with the HUD-approved final proposal, the administrator will enter into the HAP contract with the owner. Attached as Exhibit 3 is a true and accurate copy of the form AHAP which each of the plaintiffs executed with HUD

prior to signing each of their respective HAP contracts. Each of plaintiffs' HAP contracts, including the 20 contracts identified in paragraph 9, was executed pursuant to an AHAP which includes the following provision:

> *Automatic Annual Adjustments.*
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register . . .
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

11. Each of the AHAP agreements includes, as an exhibit, "[t]he Housing Assistance Payments Contract ("Contract") to be executed upon completion of the project." Exhibit 3 at ¶ 1.1c. Each of the exhibit HAP contracts that HUD appended to plaintiffs' AHAP agreements contains the adjustment provision identified in paragraph 9.

12. Consistent with the HAP agreements, HUD, between 1974, the first year a plaintiff partnership executed a HAP agreement with HUD, and various dates through 1983, awarded each plaintiff rent adjustments computed according to the AAAF formula that HUD published in the *Federal Register*. Attached as Exhibit 4 is a set of all AAAFs published by HUD from 1979 to date.

13. HUD, in 1983, and continuing at all material times through December 1989, ceased to award to Section

8 owners rent adjustments computed according to the AAAF formula published in the *Federal Register*. Despite the fact that HUD entered into HAP agreements with plaintiffs in which HUD specifically chose the formula method for adjusting rents on a yearly basis, HUD, in 1983, began to compute annual rent adjustments according to an alternative method, called a market or comparability study. Application of comparability studies presumptively guaranteed that HUD would pay project owners lower rent subsidies than HUD would be required to pay by application of the AAAF factors.

14. When HUD's California field offices, in 1983, first began to compute rent adjustment according to comparability studies, plaintiffs requested from HUD their full AAAF rent adjustments. HUD advised Section 8 developers that, for projects which sought upward rent adjustments based on the published AAAF formula, HUD would adjust project rents downward. Several plaintiffs unsuccessfully appealed from this determination and, in fact, HUD reduced their annual rents.

15. In response to HUD's threats to reduce project rents, and to protect their current rent levels, other plaintiffs' including New Hampshire Arms, A California Limited Partnership, and Valencia Villa, A California Limited Partnership, simply withdrew their requests for annual rent increases based on the AAAF formula. Attached as Exhibit 5 is a true and accurate copy of plaintiffs' correspondence with HUD, formally withdrawing their prior request for annual rent increases. Recognizing the futility of similar requests, other plaintiffs, thereafter, did not seek annual adjustments.

16. In May 1989, after the Supreme Court refused to review the Ninth Circuit's decision in *Rainer View*, HUD notified the property manager for each of the plaintiffs' Section 8 projects that HUD planned to apply the AAAF formula, prospectively and retroactively, to all of plaintiffs' projects located in the Ninth Circuit. Attached as

Exhibit 6 is a true and accurate copy of a May 19, 1989 Memorandum from James Schoenberger, General Deputy Assistant Secretary for Housing, to All HUD Regional Administrators, stating that HUD would apply the AAAFs prospectively and retroactively in the Ninth Circuit. Plaintiffs' property managers, on behalf of the plaintiffs, in fact, thereafter worked with the local HUD field offices to prepare a computer model to compute the retroactive AAAF rent adjustments.

17. Despite the representation in HUD's May 19, 1989 memorandum, HUD has never made payment to the plaintiffs for the amounts owed pursuant to the HAP agreements and the AAAFs published by HUD. The amounts HUD owes each of the plaintiffs (through March 31, 1990) pursuant to the AAAFs published in the *Federal Register*, is specified in Exhibit 1.

18. In November, 1989, Congress enacted the Department of Housing and Urban Development Reform Act of 1989. Section 801 of that Act addressed the question of comparability studies in Section 8 projects. As regards the past, Section 801 provides that HUD will increase rents by the greater of the amount determined by applying the AAAF to the base rent minus the amount of debt service or 30% of the amount determined by multiplying the full base rent by the AAAF. In the vast majority of our projects, the 30% figure will be larger, so the rent increase we would get under Section 801 would be only 30% of what we are entitled to under the HAP agreements. Even that reduced amount would be paid out over three years, without any interest to compensate us for the delay in receiving even this small portion of what we are entitled to under the contracts.

19. As regards the future, Section 801 permits HUD to use comparability studies rather than the AAAF formula which the HAP agreements require HUD to use.

20. After Congress (in November 1989) enacted the HUD Reform Act of 1989, HUD advised its regional

field offices, in December 1989, that it was imposing a temporary nationwide moratorium on the use of Section 8 comparability studies until such time as HUD promulgated regulations for the implementation of the comparability limitation. Attached as Exhibit 7 is a true and accurate copy of the December 20, 1989 Memorandum from James L. Logue, III, Deputy Assistant Secretary for Multi-Family Housing Programs, to All Regional Administrators, All Regional Directors of Housing, Field Office Managers, Directors of Housing Management and Loan Management Branch Chiefs.

21. As a result of HUD's December 20, 1989 Memorandum, HUD has applied the AAAF, instead of comparability or market surveys, to establish new rental rates for the plaintiffs with HAP contract anniversary dates subsequent to December 20, 1989. In some cases, HUD has applied the AAAF formula to compute new rental rates retroactive to May 1989. These new rates, however, are substantially lower than the rates required by the contracts and the previously published AAAFs because HUD, since December 1989, has applied the AAAFs to contract rents that HUD computed for approximately eight years according to comparability or market surveys, rather than the AAAF formula.

22. According to representations in HUD's December 20, 1989 Memorandum, the HUD field offices will compute plaintiffs' prospective annual rent adjustments according to comparability or market surveys when HUD finalizes and publishes comparability regulations in the *Federal Register.*

23. Prolonged delays in obtaining the full rent adjustments will harm not only the owners of the apartment complexes but also the tenants. The most obvious harm resulting from delay is, of course, the loss of the use of the money with the resulting loss of interest. Equally important, however, are the cashflow effects. Continued failure to receive the full amount of the rent

adjustments required by the HAP contracts may put some of the projects in precarious financial conditions. Inadequate cashflow will make it difficult or impossible to maintain the buildings properly and to take all of the security measures which are becoming increasingly necessary at certain complexes. It may be necessary to omit maintenance such as painting or repair of driveways, which does not affect the safety or health of the tenants, but certainly adversely affects their general well-being. In some cases, it may be impossible to take additional security measures, such as erecting a security fence or hiring security guards, which increasing problems of drugs and gangs make desirable. These problems are compounded by the fact that uncertainty over future rent levels sharply reduces the saleability of the complexes. This in its turn deprives owners of the incentive to make further investments in the buildings since the prospects of recovering any further investments are uncertain. This works to the detriment of tenants who are deprived of the advantages which they would derive from additional investment in maintenance and security of their apartments.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, belief and information. Executed on May 30, 1990 in Culver City, CA.

/s/ Jona Goldrich
JONA GOLDRICH

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 90-390 MRP

ACACIA VILLA, A CALIFORNIA PARTNERSHIP, ET AL., PLAINTIFFS

v.

JACK KEMP, ET AL., DEFENDANTS

DECLARATION OF LINDA L. CHEATHAM

I, Linda D. Cheatham, do declare under penalty of perjury as follows:

1. I am the Acting Director of the Office of Insured Multifamily Housing Development of the U.S. Department of Housing and Urban Development ("HUD" or "Department"). I have held this position since July 1990. As Acting Director, I have direct responsibility for all development activities that relate to the multifamily mortgage insurance programs and that establish the Section 8 New Construction and Substantial Rehabilitation Fair Market Rentals that are applied to rojects subject to those programs and Section 202 projects.

2. I offer this declaration to describe how Fair Market Rentals, as outlined in Section 8(c)(2)(A) of the U.S. Housing Act of 1937, as they relate to the Section 8 New Construction and Substantial Rehabilitation Programs, are computed and how those rents are utilized once computed.

3. The statements in this declaration are based on my personal knowledge and on information provided to me by my staff.

4. Fair Market Rentals, which HUD refers to as Fair Market Rents (FMRs) is HUD's determination of rents, including utilities, ranges, and refrigerators, parking and all maintenance, management, and other essential housing services, that would be required of a tenant in a particular market area to obtain privately developed and owned, newly constructed or substantially rehabilitated rental housing of modest design with suitable amenities. 24 C.F.R. § 880.201. Initial contract rents may not exceed area-wide Fair Market Rents established by the Department.

5. FMRs are published for each fiscal year in the *Federal Register*. The FMRs that are presently in effect were published on December 1, 1989, at 54 FR 49886.

6. The FMRs are estimates of rentals that prospective tenants who are not receiving Federal rent subsidies would be willing and able to pay for recently completed or newly constructed dwelling units of modest design, with suitable amenities. They do not necessarily represent rents needed to support construction and operating costs. The FMR process requires HUD to obtain data on the levels of rent paid for recently completed or newly constructed dwelling units of modest design within each market area, as determined by HUD field office staff, but generally multicounty areas.

7. FMRs are developed for five unit sizes as well as for five structural categories.

8. Estimates of FMRs by unit size, structural type, and market area are prepared by the HUD Field Office staffs. Surveys of at least 12 recently constructed projects for each structural type, either conventionally financed or insured by HUD, are conducted by HUD appraisers within each market area to obtain representative samples of rents paid for comparable unsubsidized recently con-

structed dwelling units of modest design with suitable amenities. No subsidized or assisted rental units are used in these market surveys. The "recently constructed" units are to be those buildings constructed no earlier than six years proceeding the year the FMR is published. For purposes of computing FMRs HUD has established 344 different geographical market areas nationwide.

9. Once the appraisers have surveyed rents in a particular geographical area, the appraiser determines what the 75th percentile of rent levels is for that market area and then trends the data ahead two years to reflect anticipated changes in rent levels. The result of that calculation is the indicated FMR for that particular market area.

10. The public is then notified of the schedule of FMRs by publication in a manner to reflect a progression from bedroom to bedroom size, and from one structural type to another.

11. The FMRs have been used in the process to establish initial contract rents for Section 8 projects approximately since 1976.

Executed on October 5, 1990

/s/ Linda D. Cheatham
LINDA D. CHEATHAM, Director
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Family Housing Development
U.S. Department of Housing
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451 7th Street, SW
Washington, D.C. 20410
(202) 708-3000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

DECLARATION OF JAMES J. TAHASH

I, James T. Tahash, do declare under penalty of perjury as follows:

1. I am the Director of Planning and Procedure Division, U.S. Department of Housing and Urban Development ("HUD" or "Department"). I have held this position in this division and predecessor Division with the same responsibilities since 1972. In my capacity as Director, I have the direct responsibility for developing policies and procedures for administrating HUD's multifamily management programs.

2. The purpose of this declaration is to describe the process used by the Department in conducting comparability studies pursuant to Section 8(C)(2)(C) of the U.S. Housing Act of 1937, as amended.

3. The statements in this declaration are based on my personal knowledge and on information provided to me by my staff.

4. In 1981 HUD began implementing its authority under Section 8(C)(2)(C) by regulation, 24 C.F.R. 880.609(c) and the standard form Housing Assistance Payments ("HAP") contracts (such as the pre 1980 contract quoted in the Ninth Circuit's decision in *Rainier View Associates v. U.S.*, 848 F.2d 988 (1988)) to perform project specific comparability reviews if the application of the Annual Adjustment Factor ("AAF") produced rents in excess of rents charged for comparable units.

5. In performing comparability reviews HUD field staff were to select the three to five projects that were used in performing the "rent reasonableness" test when the initial contract rents were set.[1] When the original projects were not available or no longer comparable, the field staff were to use other comparable projects, i.e., unassisted projects that were located in the same geographical or contiguous area as the subject project that were similarly constructed (number of bedrooms, baths, type of design), had similar amenities, and services similar to the subject project. The "same geographical area" was defined as an area that contained housing stock similar to the subject project. Generally, comparable rents for projects will vary according to when they were built. For example, the rents for older comparable projects will be lower than rents for newly built projects, unless the payments have been refinanced.

6. Once the comparable projects were selected, HUD field staff then were to use acceptable appraisal techniques to adjust the rents of each comparable project to make the comparable projects as close as possible to the subject project. The staff were then to compare the Section 8 rent that would be charged as adjusted by the applicable AAF to the comparable rents. If there was no material difference, the Section 8 rents were to be adjusted based on the AAF. If there was a material difference the Section 8 rents were to be held constant, reduced, or provided a partial adjustment to reflect the rent level determined to be comparable.

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[1] Although Fair Market Rents were to be used in seeking the initial contract rent, the rents that were authorized to be contracted for could not exceed the rents of comparable buildings. See 24 C.F.R. 880.204(b)(1)(ii) ("Rent Reasonableness"). Thus, comparability studies were required to be completed (except for Section 202 projects) before establishing the initial rent. Where comparable rents were lower than the FMRs, the FMR was not allowed to be the rental amount in the HAP contract.

7. The AAFs are, and have been since 1976, used to adjust HAP contract rents in the second and subsequent years of the HAP contracts.

Executed: November 13, 1990.

/s/ James J. Tahash
JAMES J. TAHASH
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

DECLARATION OF DAVID E. SHENK

I, David E. Shenk, do declare under penalty of perjury as follows:

1. I am the Director of the Division of Economic Market Analysis of the Office of Economic Affairs of the U.S. Department of Housing and Urban Development ("HUD"). I have held this position since 1980. In my capacity as Director I have direct responsibility for, among other things, developing the Annual Adjustment Factors ("AAF"s), which are used to adjust Section 8 rents.

2. The purpose of this declaration is to describe how HUD produces AAFs.

3. The statements in this declaration are based on my personal knowledge and on information provided to by by my staff.

4. AAFs are percentage factors that are produced by HUD. They are developed using two different market surveys, the Consumer Price Index ("CPI) and the American Housing Surveys ("AHSs"). AAFs are developed for each of the four census regions and for 74 metropolitan areas. The CPI is used to determine the average rent change in each of the above identified areas, and the AHSs are used to calculate the differences in rent changes for the range of rents from low to high rent within these areas. In developing the AAF, HUD multiplies the percentage of rent change for each geographical area (derived from the CPI) by the nationwide percentage of rent change for each of several different rents levels (derived from AHS), to determine the AAF for each rent level for that particular geographical area.

5. The CPI is a measure of the average change in the prices paid by consumers for a fixed market basket of goods and services. The CPI is estimated from a set of samples, which are designed using statistical procedures to make the survey represtative of prices paid by consumers in the United States. In developing the AAFs, HUD uses annual average data from the Residential Rent and Fuel and Other Utilities indices of the CPI. The Residential Rent component is based on a national survey of 35,000 households, that are interviewed by telephone or personal visit, to determine changes in market rent levels. The survey is conducted by staff of the Department of Labor, Bureau of Labor Statistics.

6. Similarly, the AHS is a market survey designed to obtain statistically valid information on rent levels. The AHS, however, is designed solely to reflect changes in costs for housing, on a nationwide, not a metropolitan basis. The survey consists of a national sample of 55,000 housing units, which includes about 20,000 rental units. The sampie is representative of price and rent changes for the entire nation. The AHS is conducted by the Bureau of the Census for HUD.

Executed on November 14, 1990

/s/ David E. Shenk
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-1654R

ALPINE RIDGE GROUP, ET AL., PLAINTIFFS

vs.

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Housing and Urban Development; and the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS

DECLARATION OF JANET MARIE

I, JANET MARIE, hereby declare as follows:

1. From 1979 through 1983, I was employed by HUD in the administration of the Section 8 program. From 1983 to 1987, I worked for the State of Washington in administering Section 8 contracts on behalf of the Department of Community Development.

2. In 1988, I formed Alexander Consultants Incorporated, a consulting firm for owners of governmental subsidized housing, including Section 8. My firm assists housing providers of low income families and senior citizens with the complex administrative and management activities unique to various government subsidized housing programs.

3. My firm represents the 97 project owners involved in the *Alpine Ridge* lawsuit. The statements in this

Declaration are based on my personal knowledge and on information provided to me by my staff and the project owners and managers.

4. The purpose of this Declaration is to respond to portions of the Declarations filed in this case by Robert Stettner on March 11, 1991 and Diana Shavey on April 28, 1991.

5. In paragraph 6 of Mr. Stettner's Declaration, he states as follows:

> Since [September, 1990], HUD has dutifully honored all rent adjustment requests (not only from plaintiffs in this matter, but from all Section 8 project owners that have projects within the jurisdiction of HUD's Seattle field office) by applying the applicable AAAF to the last HUD approved rent.

The first point is that, even if the statement were true, it should not be taken to mean that the project owners are receiving the rents to which they are entitled under the declaratory judgment. By "last HUD approved rent," Mr. Stettner is referring to the rents that were previously set contrary to the declaratory judgment, in most cases based on rent cuts from individual comparability studies in the 1980s. Even the projects which have received AAAF rent adjustments since the declaratory judgment are at rent levels up to 25% below the levels that would have resulted from AAAF rent adjustments during the 1980s. The other point is that the statement is untrue. In fact, *most* rent adjustments since the declaratory judgment have not been made to date. Attached as Exhibit A to this Declaration is a list of the projects in this litigation which have not received rent adjustments that became due since the declaratory judgment. The list includes those projects administered in the Seattle HUD office to which Mr. Stettner's Declaration refers, as well

as the projects in this litigation which are administered in other HUD field offices.

6. In paragraph 8 of Mr. Stettner's Declaration, he states as follows:

> The Department has not been advised by any plaintiff owner that its project is suffering a financial hardship resulting from the perception that they are owed more monies under their housing assistance payments contract than they are receiving. Indeed, most of the projects that are subject to this litigation are financially healthy and are throwing off surplus cash.

This statement refers to the "projects that are subject to this litigation" when his office only administers a little more than half of the projects. The other projects are administered by other HUD offices in Fresno, California, Sacramento, California, San Francisco, California, Los Angeles, California, Santa Ana, California, Denver, Colorado, Phoenix, Arizona, Las Vegas, Nevada, and Helena, Montana. Even with respect to the projects administered in the Seattle office, the statement is untrue and misleading. Attached are several letters from project owners describing their financial difficulties. The first five letters relate to projects administered out of the Seattle office. The statement that projects are "throwing off surplus cash" is misleading because of the way HUD defines the term. To HUD, the term includes any project which has one penny more than enough to meet HUD's "approved" expenses for the following month. The types of expenses HUD does not approved include legal fees in enforcing their rights against HUD, as well as other expenses deemed by HUD to be "unrelated," "unnecessary," or "excessive." For example, on the Coho project in Alaska (See attached letter from project owner), the project owner was required by the City to spend several thousand dollars to enclose dumpsters to keep out bears. HUD did not

"approve" the cost as necessary to maintain "decent, safe and sanitary" housing.

7. The attached letters from project owners are all I was able to get on short notice. Most of the other project owners have the same problems. Several project owners and managers declined to respond in writing for fear of retaliation from HUD. Examples of their statements are as follows:

> You know our (project) accounts receivable are overdue. We're in a financial mess. I don't want to draw any attention to myself by making a formal statement.
>
> I am afraid of HUD. I don't want to make any waves.
>
> The HUD inspector showed up at my project unannounced and harassed my on-site manager. She was intimidated and frightened.
>
> I told the owners to call you when I heard about this lawsuit. I know they are fed up and wish they had never gotten involved with Section 8 or HUD. I don't want HUD to know that I even suggested that the owners join the lawsuit. They're likely to take it out on some of my other projects.
>
> The HUD loan servicer visited our (senior citizen) tenants and told them that we are making excess profits, and we don't really give a damn about the tenants.
>
> I'm sorry that I avoided you (Janet Marie) at the conference. There were so many HUD people around from my local office. They don't know my project is in the lawsuit yet, and I would just as soon keep it that way as long as possible.
>
> (One) HUD loan representative told me that if we sue HUD, she will not process my rent increases for

other projects that are nonprofits. I just can't afford that chance.

8. Based on my extensive experience with all of the projects in this litigation, including those administered outside of the Seattle office, it is my estimate that over 75% of the project owners receive no return on their time and investment. They have been for years and still are literally working for nothing. Practically all of those projects are taking steps to opt out of the Section 8 program and remove the housing from the low income and elderly market. Roughly 35% to 40% of the projects are not even receiving rents sufficient to meet legitimate project expenses, resulting in staff cutbacks and deferred maintenance of the projects. The staff cutbacks, both in quantity and quality, mean the services to the tenants are greatly diminished (e.g., supervising and assisting the elderly and monitoring drug and other criminal activities), and the voluminous paperwork required by HUD is not being properly completed. The deferred maintenance has resulted in the deterioration of the physical condition of the projects which, in some cases, poses a danger for the tenants. At this time, roughly 10% of the project owners are ready to walk away from their projects. The percentages listed above have grown over time and will continue to grow unless and until the project owners begin receiving the rents to which they are entitled. If the current rents remain in effect, it is my opinion that many rental units will be lost to the low income and elderly tenants, either by foreclosure or the projects opting out of the Section 8 program.

9. In the Declaration of Ms. Shavey, she states that 15 hours of administrative time will be required to bring current rents to their proper levels. My firm has already made those calculations for *all* of the projects in this litigation. Even though we had to obtain most of the information *from HUD*, we spent roughly five to ten hours per project. On a number of projects, we have already provided the figures to HUD, and in all other cases we are prepared to provide the figures to HUD, together with all supporting data. If HUD reviews our figures, rather than starting from scratch, it should take no more than two to four hours per project.

I state under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 13th day of May, 1991.

/s/ Janet Marie
JANET MARIE

SUPREME COURT OF THE UNITED STATES

No. 92-551

JACK F. KEMP, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

ORDER ALLOWING CERTIORARI

Filed November 16, 1992

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

November 16, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 342479 67005